ULRIKE HERRMANN

ROSA LUXEMBURG STIFTUNG
BÜRO BRÜSSEL

FREE TRADE
PROJECT OF THE POWERFUL

TTIP TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

INHALT

Introduction

A worldwide trend: Free trade agreements

250 years ago: How the theory of free trade evolved

How industrialised countries became rich: Protectionism instead of free trade

The suffering of developing countries: Free trade only benefits the powerful

Why TTIP? Indicators and wing mirrors

Negotiations in secret: The rhetoric of fraud

A warning for TTIP critics: The chlorinated chicken will never come

Ignoring the constitution: Special rights for investors

Conclusion: A warning from Canada

References

INTRODUCTION

Americans and Europeans are negotiating a free trade agreement called TTIP. But why? Trade is already flourishing. Meanwhile, the real barrier to trade is not being addressed: currency speculation, which leads to extreme currency fluctuations and ad hoc price increases for export goods.

If we are to understand the political obsession with free trade, we must look far back in history, beyond the current negotiations. An examination of the past 250 years shows how industrialised countries have become rich and why developing countries remain poor – and why free trade only benefits rich countries.

Free trade is an ideology of the powerful and can be a very effective means of engaging in lobbying. Critics are right to seek to prevent TTIP. However, some of the keywords they use to mobilise activists are wrong. The infamous "chlorinated chicken" that many consumers are afraid of will never come. The strategy employed by the corporations is far more perfidious: lobbyists trying to push through certain consultation procedures that would give them substantial influence – on two continents, and thus worldwide.

TTIP is an exciting topic: As if under a magnifying glass, it shows how capitalism works – and the power that still remains with politics.

A WORLDWIDE TREND: FREE TRADE AGREEMENTS

Today, promoting free trade agreements is a worldwide trend. At least 110 countries are parties to negotiations concerning more than 22 regional free trade agreements. At first glance, it is therefore not unusual that the US and the EU would seek to conclude a transnational free trade agreement, named the "Transatlantic Trade and Investment Partnership" (TTIP).

No continent wants to lag behind when it comes to promoting free trade. To name but a few examples: On 22 November 2012, the ASEAN countries entered into negotiations on a regional free trade agreement with Australia, China, India, Japan, New Zealand and South Korea.

In parallel, the five Asian countries of Brunei, Japan, Malaysia, Singapore and Vietnam are negotiating with the US, Canada, Mexico, Peru, Chile, Australia and New Zealand on a Trans-Pacific Partnership (TTP). China might also join these negotiations.

The focus of the US is therefore not only the EU, and vice versa. The Europeans are negotiating with Americans, but they are also involved in several other free trade agreements.

On 1 March 2013, the EU and Morocco officially entered into talks, which were later also joined by Egypt, Jordan and Tunisia. Since 6 March 2013, the EU has been negotiating with Thailand, and in the same month, negotiations were initiated with Japan. In addition, negotiations have been underway with India since 2007, and since 2000 with the South American economic zone of Mercosur. Negotiations with Singapore were concluded in December 2012, and an agreement with Canada has almost been completed.

Although many countries seek to conclude free trade agreements, the talks between the US and the EU are of particular importance. The negotiations concern the two most important economic areas in the world, which together account for 44% of global economic output and 60% of foreign direct investment. An agreement between the EU and the US would set worldwide standards by which other countries would also have to abide.

A free trade agreement between the US and Europe is aimed at – as the name suggests – stimulating trade. Said trade, however, is currently not actually doing too bad. Every single day, goods worth approximately EUR 1.8 billion are being exchanged between the US and Europe.

If trade is already flourishing, why do we need a free trade agreement at all? This question gains additional significance if we look at the actual trade barrier: currency speculation.

Up to USD 5.3 trillion are in use every day around the world to speculate on currencies. By contrast, the entire world trade was only USD 18.4 trillion in 2012 – that is, in a year. Daily currency speculation has long since been disconnected from trade flows.

Currency speculation is, however, not without consequences for global trade, since exchange rates dramatically fluctuate. To give but one example: Between 2010 and 2013, the dollar swooped to between 1.20 and nearly 1.50 against the euro. For German exporters this meant that their commodities increased in price by 25%.

However, nothing is done at the international level to counter currency speculation, although exchange rate fluctuations pose the greatest risk to trade. Instead, countries focus on topics such as customs duties and non-tariff trade barriers, which play a significantly more minor role.

These strange priorities cannot be explained by looking only at the present situation. The ideology of free trade has become powerful over its 250-year history. The theory of free trade evolved in the struggle against mercantilism, which the leading economists of the day regarded as government interference.

250 YEARS AGO: HOW THE THEORY OF FREE TRADE EVOLVED

Europe is a special continent, even if this may not be evident to a lot of Europeans. Nowhere else on the world are so many countries concentrated in such a confined space – a fact that has also caused permanent conflict. Since the fall of the Roman Empire, European states were almost constantly at war – and only those rulers survived who were able to finance mercenaries. The warlords needed silver and gold to pay the soldiers.

Very early on, the rulers dealt with the question of how they could increase the amount of precious metals in their treasure chambers. They came up with an idea, which in modern commercial parlance would be referred to as a “surplus”. In order to bring additional gold and silver into the country, they needed to export more than they imported.

They then began to encourage domestic companies and monopolies to produce export products. Conversely, they prohibited imports and imposed high customs duty on them. This strategy was referred to as “mercantilism”.

The first mercantilist is thought to be King Edward III of England, who ruled from 1327 to 1377. He wore only English cotton so as to encourage his subjects to buy local products – and not Flemish fabrics, which were the latest trend back then. Meanwhile, he brought Flemish weavers into the country and asked them to instruct English manufacturers on the latest technologies. Thus, we can see that the concept of plagiarism already existed in the Middle Ages.

Even if the rulers considered it logical to develop the export industry, mercantilism had two decisive disadvantages, which people were already aware of back then. First: From a logical perspective, it is impossible for all countries only to export goods without any actually importing anything. Trade would collapse.

Second: Mercantilism was beneficial for the rulers, but not for the consumers. Citizens were vexed by the high import duties, which were a kind of special tax levied by the king. In addition, many manufacturers exploited the fact that they were protected against foreign competitors. They charged high prices for goods of poor quality, i.e. they made a kind of monopoly profit.

These specific practical problems were addressed by Adam Smith (1723 - 1790) and David Ricardo (1772 - 1823), who were not only the founding fathers of modern economics, but also the most popular champions of free trade.

In retrospect, it is striking that the two economists liked to illustrate their criticism of mercantilism with a particular example – with the annoyance that French wine was extremely expensive due to high customs duties. It is not an exaggeration to argue that free trade was a much-discussed issue because two economists just wanted to drink better wine at lower prices.

In his famous book *The Wealth of Nations*, written in 1776, Smith made the smug remark: “By means of glasses, hotbeds, and hot walls, very good grapes can be raised in Scotland, and very good wine too can be made of them”, but unfortunately, the price of this wine would be 30 times higher than of foreign wine. Smith also did not shy away from moral and medical arguments to demand the free import of wine: “the cheapness of wine seems to be a cause, not of drunkenness, but of sobriety. The inhabitants of the wine countries are in general the soberest people in Europe”

For Smith, free trade was a form of division of labour. He thought that each country should specialise in products it could produce best and cheapest. However, an empirical issue emerged soon after. It was evident that it was easier for France to produce wine than England – simply for reasons relating to the weather. But what is the explanation behind the fact that industrialised countries tend to exchange commodities that both countries produce? What is the point, for example, of the US supplying Europe with chemical products – while Europe is supplying the US with the very same products?

David Ricardo was the first to deal with this question. In 1821, he published his theory of “comparative advantage”, which now features in every economics textbook. Ricardo also fell back on the example of alcohol to explain his theory. Let us assume that both Portugal and England can produce port wine as well as textiles, and that England can produce port wine and textiles at a lower cost than Portugal. Further, England is more efficient in the production of cloth than in wine production. In this case, it would be beneficial for England to produce only textiles and leave the port wine production to Portugal, even though England can produce port wine at a lower cost than Portugal. This is because maximum profit is achieved by focusing on business areas with the highest productivity.

Ricardo‘s theory of comparative advantage is appealing, because it is absolutely sound from a mathematical point of view. It was considered a proven fact that free trade is a win-win situation for all countries involved. However, in spite of the mathematical achievement, there was something not quite right with the theory: Ricardo‘s contemporaries soon noticed that England was becoming richer, while the Portuguese economy stagnated.

For a long time, free trade remained pure theory. In practice, Europeans and the US relied on protectionism to industrialise themselves and to close the technical gap with Great Britain.

HOW INDUSTRIALISED COUNTRIES BECAME RICH: PROTECTIONISM INSTEAD OF FREE TRADE

People at that time would never have imagined that England would revolutionise the global economy. The United Kingdom was known to be a small country and had only an estimated 7 million inhabitants in the 18th century. The European great power at that time was France, with a population of approximately 25 million.

Nevertheless, in 1760 a development in England would change the world forever: machines began to replace manpower. Until today, there is no clear answer to the question as to why the industrial revolution began in England of all countries. Two phenomena in particular appear highly surprising in retrospect.

First: Industrialisation initially took place without science. The first machines were not built in universities, but by craftsmen who tinkered around for many years to optimise looms and spinning wheels.

Second: Modern capitalism at first did not require large capital investments. The first machines were not funded by large banks in London. Instead, businessmen borrowed the necessary money from friends and family. With as little as 100 pounds it was possible to set up a textile factory.

If the first machines were technically simple and affordable at that – why was the first mechanical loom not being used in Hesse, in Burgenland or in Sicily? Why in England of all places?

This mystery has long kept economic historians busy. The American economic historian Robert C. Allen, who nowadays teaches at Oxford, has provided probably the most persuasive explanation. He argues that wages in England in the 18th century were the highest in the world and the English textile industry was no longer competitive. It was worth using machines simply because manpower was so expensive[1].

Until 1870, the technological progress in Great Britain remained unchallenged. As well as revolutionising the textile industry, the British also developed the railway and modern smelting.

The English had not planned industrialisation; they simply drifted into it. The situation was however radically different for their European neighbouring countries. They wanted to close the technological gap as quickly as possible, which meant they had to come up with a strategic approach to achieve industrialisation. The Europeans and Americans always used the same tricks.

Industrial espionage was practised systematically by enticing British technicians and importing and producing English machines in secret. At the same time, tariff barriers made sure that their own industrial enterprises were protected against the clearly dominant British competition.

The motto was protectionism instead of free trade. In the US, duties were particularly high, i.e. between 35% and 50% on average – from 1820 until the Second World War. It was only in 1950 that US tariffs began to fall steadily.

Therefore, if the US is today pretending to be the first advocate of free trade, this must be regarded as historical misrepresentation. Americans only began to lower customs duties when they were without doubt the global economic superpower.

This pattern can be observed throughout history: Free trade is an ideology of the powerful. Customs duties are only eliminated when their own industry is one of the world leaders and would not be threatened by competition.

Thus, the British were the first to make the transition to free trade: In 1848, Great Britain still levied customs duties on 1,146 different goods. In 1860, the number fell to 48. It took 80 years to introduce the free trade Adam Smith had been demanding back in 1776.

THE SUFFERING OF DEVELOPING COUNTRIES: FREE TRADE ONLY BENEFITS THE POWERFUL

Today, developing countries are in a situation reminiscent of Germany or France in the 19th century. They need to reduce the technological gap which separates them from the industrialised countries.

Sometimes, this gap closes of its own accord. The textile industry serves as good example. It is no longer based in Europe, but has migrated to the Third World. Looms and spinning mills were tweaked until they were affordable enough to make them worth using in countries with very low wages. By the time the electrical sewing machine was invented in 1889, it was possible for even developing countries to grow their own textile industry.

However, other industries seemed not to be able to overcome this barrier. For example, cars or high quality drugs are still being produced in industrial countries. Let us rephrase this: Why can't Peru, Zimbabwe, Malawi or India just steal and copy the machines from the West, and become rich themselves? The answer is simple: Industrialisation would be too expensive and not be profitable. Western machines require enormous capital expenditure per worker, and these investments are only worthwhile if labour is expensive.

Developing countries are caught up in a vicious circle, the economic historian Allen explains: Wages are so low that it is not profitable to increase productivity. Since productivity does not

increase, the countries remain poor and wages low.

Only governments can break the vicious circle by assuming central control of industrialisation. Be it Japan, Taiwan, South Korea or China, they were able to close the technological gap with the West in half a century because the government made and planned initial investments. It was the government that commissioned the electricity companies, blast furnaces and car plants. At the same time, it introduced tariff barriers to protect their own industries against Western products. The Asians of the 20th century therefore copied the Europeans of the 19th century.

However, developing countries are faced with a situation that did not yet exist 150 years ago, during the industrialisation of Germany or France. Technological progress means that the required minimum size of a fabric is constantly increasing.

The automobile industry is a good example: Even large countries such as Argentina are too small to open their own car plants. Car production is so expensive that it would only be profitable with an immense internal market. China, with a population of approximately 1.3 billion, has therefore a clear advantage, since it is still able to limit imports, control foreign exchange and establish its own industry behind high tariff barriers.

Smaller developing countries are no longer able to follow this route; they are trapped. In order to find a large enough market for their products, they depend on global free trade. At the same time, it is precisely this free trade that favours above all industrial countries that are technologically superior and have no competition to fear.

Today's developing countries are at a considerable disadvantage compared with 19th century Finland or Hungary when they were trying to catch up with Great Britain. According to calculations of the South Korean economist Ha-Joon Chang, who teaches at Cambridge, the gap between the richest and poorest countries at the time was 4 to 1 at most. By now, the gap between rich states, such as the US, and the poorest countries, such as Ethiopia or Tanzania, has widened to approximately 60 to 1. Even emerging economies such as Brazil lag behind at 5 to 1 in terms of their economic productivity.

This means that if a country such as Brazil wants to defend itself against the preponderant influence of industrial countries, customs duties at the level of 40%, as imposed by the US in the 19th century, would no longer be sufficient. Rather, custom duties would have to be well above 100%. Instead of this, developing and emerging countries are being forced to conclude free trade and WTO agreements, which lead to a decrease in tariffs.

It is therefore extremely unfair that free trade agreements to date always assume that the agreements have to be symmetrical and that countries should reduce their custom duties as much as possible. Instead, international agreements need to take the different stages of development into consideration. It is right that industrial countries should no longer levy customs duties, since this artificial protection results in businesses circumventing competition and gaining monopoly profits, which would have to be paid for by consumers. Developing countries need the chance to protect their young industries against the all-too-powerful competition of industrial countries.

Developing countries have of course long since recognised that they are being disadvantaged by free trade agreements, which is why the international WTO negotiations have repeatedly ended in deadlock. For the Europeans and Americans, TTIP is therefore a welcome detour to enforce global free trade beyond the WTO.

WHY TTIP: INDICATORS AND WING MIRRORS

Customs duties in the US and Europe can hardly be further reduced, since they are already very low. According to WTO estimates, customs duties in the US are 3.5% on average, and in the EU 5.2% on average. They have almost hit rock-bottom.

Therefore, TTIP negotiations have focused on so-called "non-tariff barriers", i.e. product regulations hindering the exchange of goods. The automobile industry is an often-cited example: In Germany, wing mirrors have to fold in – but not in the US. Similarly, the rear indicator can be red in the United States, but must flash yellow in the EU. There are also divergent national regulations concerning roof padding, headlight intensity and the curvature of rear-view mirrors. German car companies have identified about 5,000 regulations they would like to harmonise.

Mechanical engineers are also big fans of TTIP, since they could save costs by coming to an agreement with the US on how switches need to look and which fire protection regulations apply.

To date, American and European exporters have taken a very pragmatic approach to the different regulations. They just build two versions of their products – one American and one European. And Transatlantic trade has not suffered. On the contrary: goods to the amount of EUR 455 billion are being exchanged every year.

Nonetheless, efficiency could be further increased. But what would be the growth effects? Different studies on this question have been published, all with similar results: It is unlikely that TTIP will bring substantial growth.

The European Commission was the first to commission a study, which was carried out by the Centre for Economic Policy Research in London. Initially, the results sound impressive: Growth of 0.5% is expected in the EU, and 0.4% in the US. In absolute terms, a plus of EUR 119 billion per year is predicted for the EU, and economic growth of EUR 95 billion for the US. The economy of the rest of the world is forecast to grow by EUR 100 billion. This is good news for the average European citizen, who would see his or her household income grow by EUR 545 per year.

It soon becomes apparent, however, that these promising figures only refer to the time when TTIP had been fully implemented, i.e. in 2027, according to the study. In other words, the European economy is expected to grow by 0.5% overall over the next 14 years, which is equivalent to only 0.036% per year. This is even below the statistical detection limit.

The German Federal Ministry of Economics commissioned another study by the Munich-based Ifo Institute, which predicted 400,000 new jobs in the EU in the long term, of which up to 110,000 could be created in Germany. Here, however, it was presumed that TTIP would reach a level comparable to the US joining the EU. A study by the Bertelsmann Foundation was even more optimistic, estimating that 181,092 jobs would be created over the next 15 years in Germany, which, however, would amount to only 12,935 jobs per year.

These poor results do not come as a surprise, since trade alone does not mean more production; at most, that there will be a different supplier. What used to be bought by a domestic producer could then be acquired by a foreign producer. The volume of goods sold, however, would remain the same.

Real growth can only be achieved by increasing production. TTIP does not give hope for large efficiency gains, because companies in the US and Europe already produce in a very cost-effective manner and have long been competing with each other. Or as Nobel laureate Paul Krugman argues, a free trade agreement can only have a large effect if one assumes that markets were previously sheltered from competition and were highly inefficient.

Given the minor benefits of TTIP, the question arises whether the free trade agreement should be concluded at all. There are enormous risks involved, which cannot even be accurately predicted, since TTIP negotiations take place in secret.

NEGOTIATIONS IN SECRET: THE RHETORIC OF FRAUD

This secretive procedure is desired and enshrined in the Treaty of Lisbon of 2009. This Reform Treaty envisages that free trade agreements are negotiated by the European Commission. The European Parliament needs to ratify the treaties, but cannot make any amendments. The parliamentarians can only accept or reject them.

The EU Commission is free to decide how much it reveals about the ongoing negotiations. To date, there is very little information available. The Commission has not even published the negotiation mandate it was given by EU governments. The EU Commission justified this secretiveness in a press release worded in a very peculiar manner, which is cited here with all its stylistic details: "The negotiating mandate for TTIP negotiations remains a restricted document which is necessary to protect EU interests and to keep chances for a satisfactory outcome high. When entering into a game, no-one starts by revealing his entire strategy to his counterpart from the outset."

The decisive terms are "EU interests", which need to be protected by a "strategy", which "must not be revealed to his counterpart from the outset". With this wording, the EU Commission suggests that the negotiations were aimed at taking advantage of the US.

Elsewhere in the same EU report it states: “The Commission will also communicate in a transparent manner with representatives of the Civil Society on this trade agreement. However, this will also be balanced with a certain level of confidentiality in trade negotiations, which is required in order not to compromise the EU´s objectives in this deal – which is in the end to create jobs for Europeans.” Again, the impression is created that European interests can only be safeguarded if the United States is left in the dark with regard to Europe‘s plans.

These reasons come across as all the more strange because they contradict the official ideology. Since Ricardo, free trade has always been praised as a win/win situation. It is claimed that everyone benefits from free trade, and that it should be introduced as quickly as possible. However, the EU Commission clearly does not believe in this doctrine itself, if it dignifies these secretive procedures as a clever tactic to hoodwink the Americans during negotiations.

The EU Commission is probably right to say that free trade does not benefit everyone. Yet it is very surprising that the Commission believes itself to be the winner. In its press releases, it implies that it will bamboozle Americans. However, there is no reason for this exuberant self-confidence. It could also turn out to be the other way around, i.e. that the US will outsmart the Europeans.

By admitting between the lines that free trade is not a win/win situation, the EU Commission is providing the most obvious reason why the agreement should not being concluded.

In addition, the EU Commission has made only selective use of its secretive practices. While industry associations were informed, the public was excluded. According to a count of the Brussels-based NGO *Corporate Europe Observatory*, at least 119 meetings with representatives of corporations took place between January 2012 and April 2013. During the same period, consumer and environmental organisations were heard only 11 times.

The EU Commission has, however, underestimated public anger. Pressure has grown to the extent that an advisory group has been founded consisting of 14 consumer groups and trade unions. They are to be “continuously informed”, Trade Commissioner Karel De Gucht confirmed in newspaper interviews. On 25 February 2014, the committee met for the first time.

Still, the basic problem remains: In spite of these hearings, the EU Commission can act autonomously. TTIP negotiations do not provide for a real democratic right to participate. At the end of the day, the European Parliament can only agree or disagree; it cannot object to individual clauses. Once the agreement is concluded, there is effectively no possibility to amend it. Since the consent of all contractual partners is required, the US or only one single EU country could veto each amendment.

It is therefore necessary to prevent TTIP. However, NGOs need to make sure that they use the right critical arguments. If they waste time on the wrong topics, it will be relatively easy for the EU Commission to outmanoeuvre them.

A WARNING FOR TTIP CRITICS: THE CHLORINATED CHICKEN WILL NEVER COME

Criticism of TTIP can be summarized under three headings: chlorinated chicken, hormone-treated meat, and GM food. This is in reference to US agricultural and food laws often being more lax than in Europe.

For example, chlorine can be used to disinfect chicken and hormones can be used in cattle farming to promote faster growth. In addition, labels on fodder do not need to declare whether it contains genetically modified plants.

Europeans are, however, not the only ones with fears. Many US citizens find it bizarre what is allowed in the EU. They believe that importing European beef entails a risk of being contaminated with the BSE agent. They also find it terrifying how quickly new drugs are approved in Europe. And they are disconcerted by the relaxed requirements imposed on tobacco companies.

The negotiation committees are aware of these mutual fears. The EU Commission knows very well that TTIP agreement would be defeated in the European Parliament if it was associated with the keywords “chlorinated chicken” or “hormone-treated meat”.

EU Trade Commissioner De Gucht therefore assures in every interview that he will not change European laws just to get the deal done. In this context, De Gucht is referring to the free trade agreement with Canada, which has almost been completed. He claims that the Canadians had tried to negotiate in support of hormone-treated meat by means of quotas, but that the EU would only accept hormone-free beef. He argues that the EU will tell the US the same, which basically applies to genetically modified organisms or cloned products. He stresses that the laws will not be changed; they are simply not up for negotiation.

Other policy areas have already been excluded from the negotiations. The EU Commission states in the German section of its website that in public debate it is often feared that such an agreement could lead to the privatization of water services. It says that these fears are unfounded, since water supply is and will not be part of TTIP negotiations. The same applies to other public services, such as healthcare, public transport and education.

With regard to other areas, it remains unclear what TTIP would actually mean. Trade unions fear that the protection of European workers could be weakened, because the US has to date only ratified two of the eight core labour standards of the International Labour Organisation. This certainly is an issue. However, we should not gloss over the reality in Europe. In Germany, workers from Eastern Europe are already being exploited with miserable wages of EUR 2 per hour. To put it in cynical terms: things cannot get any worse.

With respect to the topic of financial services, it could be argued that TTIP cannot do any more damage, since the situation is already disastrous. Critics fear that the free trade agreement would extend the lax European banking regulations to the US. However, we should not overestimate the

American banking regulation called the Dodd-Frank Act. It is full of loopholes and there would not be any loss if European standards were to apply instead. It has not been possible to limit the power of investment banks following the financial crisis, and TTIP is not going to change this sad fact.

The controversial negotiation issues also include public tenders. The EU has high hopes that 31 million workers in Europe would benefit from their companies receiving state projects. Just imagine how many jobs could be created if Europeans were allowed to participate in public tenders in the US! For until now, the "Buy America" provision has seen German mechanical engineers, for example, excluded from the bidding process in the US.

Critics, however, fear that it could be very dangerous to approve public tenders. They doubt whether governments would still be able to set out social or ecological standards to be observed by bidders. Trade unions therefore call for public tenders be entirely excluded from TTIP negotiations.

In addition, it is naive to believe that additional jobs would be created if Europeans were allowed to participate in US tenders. For it would also mean that Americans could penetrate the European market, which in turn would result in jobs being lost.

Finally, it is undecided how the precautionary principle should be dealt with. The European Parliament asks that it remain unaffected. In Europe, products are deemed unsafe until the contrary is proven. This principle is, for example, laid down in the European REACH chemical regulations. Americans, in contrast, believe this precautionary principle to be a protectionist barrier, because in the US, goods and procedures are deemed safe until the contrary is proven. This difference can, for example, be seen in gas extraction by fracking, which is prohibited in many European countries, but is practiced in the US on a large scale.

Since negotiations are being held in secret, it is impossible to estimate what the agreement will ultimately look like. But the EU Commission will be smart enough to act in a tactically smart way and minimise arguments that could be challenged. De Gucht's assurances, that "we are not lowering standards in TTIP. Our standards on consumer protection, on the environment, on data protection and on food are not up for negotiation. There is no "give and take" on standards in TTIP," are therefore quite convincing.

The chlorinated chicken will never come. The EU Commission will preserve the status quo so as to refute the critics' arguments. The anti-TTIP movement will manoeuvre itself into a dead end if it continues to mobilise using keywords such as "hormone-treated meat". Although these disgusting terms attract a great deal of public attention, they might turn out to have a boomerang effect. The EU Commission only needs to come to an agreement with Americans that chlorinated chickens are to be excluded and it will be very easy to show up and silence the critics.

Some NGOs offer explicit warnings about this. The *Corporate Europe Observatory* states on its website that it is very likely that the final TTIP text will lack any direct concessions with regard to healthcare or environmental guidelines. The anti-lobby association is anticipating that the

Americans and Europeans will initially only agree on standards which require little negotiating effort since they are already similar on both sides of the Atlantic.

For the *Corporate Europe Observatory*, this is not a positive shift. On the contrary, it remains a principal threat: TTIP could be designed as a “living agreement”, i.e. the agreement would stipulate that it is necessary to examine at a very early stage of each legislative procedure whether the new law has a “material” impact on trade relations. These clauses would allow European and American companies to drastically expand lobbying activities, because they would constantly have to be consulted on both continents.

The real danger of TTIP is that it could establish undemocratic procedures resulting in excessive corporate power. A further source of concern is a special topic which is also to be regulated by the agreement: investor protection.

IGNORING THE CONSTITUTION: SPECIAL RIGHTS FOR INVESTORS

A free trade agreement governs trade between countries, but many companies choose another way to export their goods: they build factories abroad that enable them to produce on-site for the foreign market. The German automobile industry has long since established subsidiaries in the US, where it produces the VW Passat or the Mercedes C class. TTIP would also take these direct investments into consideration – by means of investment protection clauses.

Such clauses are nothing new. Germany alone has already concluded about 130 bilateral agreements – with more than 3,200 agreements concluded worldwide – that contain investment protection clauses.

These agreements allow foreign companies to sue a country if they see their investments jeopardized. They can then appeal to an international court of arbitration, which consists of three members that are newly appointed each time: a representative of the investor, a representative of the defendant state and a mediator on which both parties have agreed.

In most cases, arbitration courts consist of lawyers from international law firms that specialise in investor protection. The proceedings are not public – and can above all not be challenged. There is no possibility of appeal, and the arbitral award is final and binding.

In the years from 1994 to 1996, investment protection agreements were particularly popular. According to the United Nations Conference on Trade and Development (UNCTAD), four agreements per week were being concluded back then. In 2011 it was only one agreement per week.

For many years calm reigned with regard to these special corporate rights to litigation, but recently, the number of litigations has been increasing. In 2012 alone, 58 new arbitration proceedings were initiated against countries – a record that holds to this day. According to UNCTAD investigations, a total of at least 514 actions had been brought by investors by 2012. Due to the lack of a central register, there is however no detailed overview.

Some cases have attracted world-wide attention. The Swedish energy corporation Vattenfall has brought an action before a court of arbitration because of the German nuclear phase-out. Vattenfall is demanding compensation from Germany to the amount of EUR 3.7 billion because it had to prematurely shut down its Krümmel and Brunsbüttel nuclear power plants. Vattenfall relied on the Energy Charter Treaty to support its claims, to which Germany is also a signatory. This international agreement was signed in 1994 and was originally aimed at liberalising the energy market, but it also contains investment protection clauses.

In 2011, Vattenfall had already successfully used the same Energy Charter Treaty. The Swedish corporation sued the city of Hamburg, because it considered the environmental standards for the coal power plant in Hamburg-Moorburg too strict. Politicians and Vattenfall reached an out-of-court settlement. Very little is known of the deal, but it did not go unnoticed that environmental standards were relaxed afterwards.

Another popular trick involves Corporations using foreign subsidiaries to sue their own government. The Canadian energy company Lone Pine used a US branch to initiate proceedings against the Canadian government, which had adopted a fracking moratorium in the province of Quebec in 2013. Lone Pine demanded CAD 250 million compensation, because their mining rights were allegedly being restricted. UNCTAD termed this detour involving foreign subsidiaries "nationality planning".

Ecuador was particularly hard hit. A court obliged the poor developing country in 2012 to pay USD 1.77 billion to the American oil company Occidental, because Ecuador had terminated a mining concession unilaterally.

These high sums stimulate investors worldwide and encourage other companies to give arbitral proceedings a try. Two Chinese investors sued the Belgium government when it had to save the bankrupt bank Fortis, which was caught up in the maelstrom of the financial crisis. The Chinese demanded USD 2.3 billion as compensation. Other investors announced that they wanted to drag Italy, the Czech Republic and Spain before a court of arbitration, because these countries had reduced subsidies for solar energy systems when they could no longer afford them.

The courts of arbitration are usually based at the World Bank. In 2012, 244 of the known 514 proceedings were resolved with about 42% of the actions being decided in favour of the government, and about 31% in favour of the investor. 27% were resolved by settlements, the details of which were kept confidential.

At first glance, the investment protection clauses do not seem to be dangerous, since the governments seem to win most of the cases. However, this gives a false impression, as Pia Eberhardt of *Corporate Europe Observatory* found out.

First: The procedures are not balanced. Only a government can be brought before a court of arbitration. Companies are not required to account for their actions; for example, if they disregard human rights. Second: Approximately 27% of the proceedings were resolved by settlements, which we can assume that the companies were only willing to accept because they constituted high compensation or other concessions. The Moorburg case is a typical example. Only when

environmental standards for the power plant were relaxed was Vattenfall willing to give in. Third: Governments often abandon laws if corporations merely threaten proceedings. And fourth: Foreign investors enjoy a privilege that domestic investors do not have, i.e. they can take action against jurisdictions twice. They can bring the matter before national courts – and additionally before an international court of arbitration. Investor protection is so strong that it practically annuls the German basic law, which stipulates in Article 14, paragraph 2: "Property entails obligations. Its use shall also serve the public good." This social responsibility does not play a role in courts of arbitration.

Investment protection is being perverted. Originally established to protect companies in foreign countries that do not have a functioning legal system, it now forces governments to pay even if they treat domestic and foreign companies equally and observe democratic standards. It is enough for an investor to believe that they would be "indirectly expropriated" if a government changes its laws to the detriment of corporate profits. This can refer to regulations on consumer and environmental protection, land and raw materials use, or minimum wages and protection against dismissal.

Not only does investor protection raise fundamental questions; it is also failing to work in practice. UNCTAD has recently summarized all main issues in a text. Courts of arbitration are ad hoc tribunals, which gives rise to very divergent decisions in similar cases. However, a decision cannot be revised because appeals are not permitted. In addition, proceedings are delayed for years, since the lawyers involved want to earn as much as possible. On average, an action costs USD 8 million. Some law firms and hedge funds even have developed their own business model called "litigation finance". This involves encouraging companies to file a suit and contributing to the cost in order to obtain a share in the compensation later on.

Investment protection agreements are extremely problematic and unfortunately cannot be eliminated immediately, since they are laid down in more than 3,200 international agreements. However, according to UNCTAD, many of these agreements are set to expire. At the end of 2013, more than 1,300 bilateral agreements were at a stage where they could be either renegotiated or terminated. A further 350 bilateral agreements will reach this stage between 2014 and 2018.

An important restriction should however be noted: If an investment protection agreement is terminated unilaterally, the so-called "survival clause" applies, which extends the validity of the agreement for another 10 to 15 years before it finally expires. An additional obstacle is that the "most favoured nation" provision is not subject to a time limit in many agreements. Investment protection therefore remains applicable if it is laid down in other agreements.

In order to circumvent these difficulties, many countries are starting to renegotiate bilateral agreements and transform them into regional agreements. This trend is specific to Europeans, who have shifted the negotiation mandate for the 2009 Lisbon Treaty from individual countries to the EU Commission.

De Gucht is adhering to investor protection, but wants to eliminate some drawbacks of TTIP. He wants to ensure that recourse to arbitration should only be possible if domestic remedies have already been exhausted. In addition, the right to bring actions should no longer exist if domestic and foreign companies are treated equally. The proceedings and corresponding documents must also be made public. Finally, the Trade Commissioner wants to negotiate options for appeal if an arbitral award is disputed.

Nevertheless, the public no longer trusts the EU Commission. Public pressure has now become such that De Gucht has deviated from the maxim of operating only in secret with regard to investor protection. He will present a paper in March which will then be discussed in the EU for 3 months before negotiations with the US can resume. It is certainly no coincidence that this will keep the controversial issue of TTIP out of the European elections in May.

To date it is completely unclear what results will emerge regarding investor protection. But one blueprint gives cause of concern: the European free trade agreement with Canada.

1 It is beyond the scope of this paper to explain the reasons for the high wages in England in the 18th century. Those who wish to learn more about this should read Allen's book (see references).

CONCLUSION:
A WARNING FROM CANADA

The free trade agreement with Canada has been under negotiation since 2009 and has now been largely completed – but not published. The EU Commission probably fears that the text of the agreement will be met with so much public outrage that TTIP negotiations would fail immediately and permanently.

The EU Commission has already experienced twice how dangerous public outrage can be: the multilateral Anti-Counterfeiting Trade Agreement – ACTA – was blocked in 2012, as was the international investment agreement MAI in 1996.

Thus, the EU Commission is silent on what it has negotiated with Canada. Until now, all we have are rough summaries and some excerpts that have been leaked. But even this meagre amount of information is sufficient to alert experts.

A principal witness is the Canadian lawyer Howard Mann, who has been dealing with investor protection agreements for more than 15 years and has cooperated with more than 75 governments on issues of investment clauses. In December 2013, Mann was commissioned by the Canadian parliament to assess the free trade agreement with Europe. His assessment was devastating: This agreement was the most "investor-friendly" contract the Canadian government had ever negotiated.

It can thus only be assumed that we cannot trust the EU Commission's assurances that it wants to restrict investor protection. Instead, it is presumably going to enter into agreements which go far beyond prior agreements.

The agreement with Canada is, however, not merely a blueprint of what could be expected from TTIP. It is worse. The German Macroeconomic Policy Institute (IMK) warned that TTIP would not even be necessary, should the agreement with Canada be ratified. For the US and Canada are both members of the NAFTA free trade zone: Put simply, a branch in Canada will be sufficient to rely on the investor protection clauses.

As we can see, nothing speaks in favour of free trade agreements, be it with Canada or the US. The risks are enormous – and the benefits minimal.

LITERATURE
ON THE HISTORY OF FREE TRADE

Robert C. Allen,
Global Economic History. A Very Short Introduction
(Oxford University Press 2011)

Ha-Joon Chang,
Kicking Away the Ladder. Development Strategy in Historical Perspective
(Anthem Press 2003)

Michael Heine / Hansjörg Herr,
Volkswirtschaftslehre. Paradigmenorientierte Einführung in die Mikro- und Makroökonomie,
4. Auflage (Oldenbourg 2013)

Ulrike Herrmann,
Der Sieg des Kapitals. Wie der Reichtum in die Welt kam:
Die Geschichte von Wachstum, Geld und Krisen
(Westend 2013)

Jürgen Osterhammel / Niels P. Petersson,
Geschichte der Globalisierung
(Beck 2004)

David Ricardo,
The Principles of Political Economy and Taxation, 1821
(Dover 2004)

Adam Smith,
An Inquiry Into the Nature and Causes of the Wealth of Nations, 1776
(Oxford University Press 2008)

Peer Vries,
Ursprünge des modernen Wirtschaftswachstums:
England, China und die Welt in der Frühen Neuzeit
(Vandenhoek & Ruprecht 2013)

IMPRINT

Responsible according to the German Press Law: Dr. Klaus Sühl

Author: Ulrike Herrmann
Translation: Cornelia Gritzner for lingua·trans·fair

Design: Mélanie Heddrich
Production: HDMH sprl

Publication date: Brussels, May 2014
Rosa-Luxemburg-Stiftung Brussels office Ave. Michel-Ange 11 – 1000 Brüssel, Belgien

Funded by the German Federal Ministry for Economic Cooperation and Development (BMZ).

Free trade is an ideology of the powerful and can be a very effective means of engaging in lobbying. Critics are right to seek to prevent TTIP. For the real danger of TTIP is beyond well-known headings such as chlorinated chicken, hormone-treated meat and GM food: the attempt of commercial lobbyists to establish undemocratic procedures which would give corporations substantial influence – on two continents and thus worldwide.

Since 2000, Ulrike Herrmann has been editor for economic policy and social topics for the taz daily newspaper. Herrmann often takes part in radio and television debates, amongst others, on the television programme Presseclub and the television channel Phoenix. Her non-fiction publications deal with fundamental social and economic policy issues. In 2013, her book *Der Sieg des Kapitals. Wie der Reichtum in die Welt kam: Die Geschichte von Wachstum, Geld und Krisen* (The victory of capital. How wealth came into the world: The history of growth, money and crisis) was published by Westend publishing house.

www.rosalux-europa.info